Wong Weng Foo & Co v Lim San Peen (in capacity as liquidator for London Biscuits Bhd (in liquidation)) & Anor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(A)-1991–10 OF 2022 AND W-02(A)-1992–10 OF 2022
AZIZAH NAWAWI, GUNALAN MUNIANDY AND AZIZUL AZMI ADNAN JJCA
30 OCTOBER 2023

Companies and Corporations — Winding up — Priorities — Priority of claims in liquidation — Liquidator paid employees of company termination benefits and indemnity in lieu of notice in priority over claims of general body of unsecured creditors — Liquidator filed application to be discharged and released as liquidator of company ('discharge application') — Former auditor of company applied for leave to commence proceedings against liquidator ('leave application') — Former auditor of company applied to intervene in liquidator's discharge application — Whether termination benefits and indemnity in lieu of notice ought to be accorded priority ahead of claims of general body of creditors — Whether discharge application and leave application ought to be allowed — Whether application for appointment of new liquidator ought to be allowed — Companies Act 2016 s 527

The appellant in the present appeals was the former auditor of London Biscuits Bhd (in liquidation) ('the company'). The company owed the appellant approximately RM393,571 in outstanding fees. The company had appointed the respondent from the Price Waterhouse Coopers Advisory Services Sdn Bhd ('PwC') as the liquidator of the company. Once appointed, the respondent did not immediately terminate the services of the company's employees and they remained on the payroll for four months before being terminated. Upon termination, they were paid termination benefits and an indemnity in lieu of notice. This payment was made in priority of the claims of the general body of unsecured creditors. Since the respondent's tenure with PwC would end, the respondent had filed an application for him to be discharged and released as the liquidator of the company and for Mr Victor Saw to be appointed as the new liquidator ('the discharge application'). The appellant then filed a separate application for leave to commence proceedings against the respondent, and for liquidator nominated by him to be appointed as the new liquidator ('the leave application'). The appellant had also intervened in the discharge application to oppose the said application because if the court ordered the release and discharge of the respondent, he could not thereafter be made liable for the breaches that were said to have occurred during his tenure as the liquidator of

A the company. The High Court allowed the discharge application and dismissed the leave application, hence, the present appeals. The main issue to be determined by the court was whether the termination benefits and the indemnity in lieu of notice constituted 'wages or salary' or otherwise came within any of the categories of debts that were, by s 527 of the Companies Act
B 2016 ('the CA 2016'), accorded priority ahead of the claims of the general body of creditors.

Held, allowing the appeals in part against the High Court's decisions in the leave application and the discharge application, and setting aside the release
C and discharge of the respondent with costs of RM20,000 to be paid by the company to the appellant subject to allocator:

(1) The priority of claims in a liquidation was governed by s 527(1) and (2) of the CA 2016. Of particular relevance was sub-para (b) of sub-s (1) of
D s 527, which stated that salary and wages would rank ahead of all other unsecured debts, except for debts arising as a cost or expense in the winding up itself. Importantly, only salary earned in the four months preceding the commencement of winding up would be accorded priority under sub-para (b). Subparagraph (c) provided for the next item to be
E accorded priority, which was worker's compensation due under any written law that had accrued prior to the commencement of winding up (see paras 13–15).

(2) On the authority of *Indo Malaysia Engineering Co Bhd v Muniandy*
F *Rengasamy* [1990] 3 MLJ 301, the court was of the view that the termination benefits and indemnity in lieu of notice paid by the respondent as liquidator of the company to its then employees ought not have been accorded priority over the claims of the other unsecured creditors of the company. This reason alone warranted the grant of leave
G to the appellant in order to commence proceedings against the respondent (see para 21).

(3) It followed that the appeal against the discharge application should also be allowed, to the extent that the order of the court below for the
H discharge and release of the respondent as the liquidator of the company was set aside. However, the court affirmed the order for the appointment of Mr Victor Saw as liquidator. There was no suggestion that the respondent had benefitted personally from the contended breaches, and hence the appointment of a liquidator from the same firm, PwC, should
I not be objectionable and would greatly aid continuity in the liquidation process. However, the court also ordered that the appellant's nominated liquidator, Mr Gabriel Teo, be appointed as a joint liquidator with Mr Saw, in order that the interests of the appellant and the creditors generally were appropriately safeguarded (see para 23).

[Bahasa Malaysia summary

Perayu dalam rayuan ini ialah bekas juruaudit London Biscuits Bhd (dalam likuidasi) ('syarikat tersebut'). Syarikat tersebut berhutang dengan perayu kira-kira RM393,571 dalam yuran tertunggak. Syarikat tersebut telah melantik responden daripada Price Waterhouse Coopers Advisory Services Sdn Bhd ('PwC') sebagai penyelesai syarikat. Sebaik dilantik, responden tidak segera menamatkan perkhidmatan pekerja-pekerja syarikat tersebut dan mereka kekal dibayar gaji selama empat bulan sebelum ditamatkan perkhidmatan. Selepas penamatan, mereka telah dibayar faedah penamatan dan indemniti sebagai ganti notis. Bayaran ini diutamakan berbanding tuntutan-tuntutan badan am pemiutang-pemiutang tidak bercagar. Memandangkan tempoh responden dengan PwC akan tamat, responden telah memfailkan permohonan untuk dia dilepaskan sebagai penyelesai syarikat dan untuk En Victor Saw dilantik sebagai penyelesai baharu ('permohonan pelepasan'). Perayu kemudiannya memfailkan permohonan berasingan untuk kebenaran memulakan prosiding terhadap responden, dan bagi penyelesai yang dicalonkan olehnya untuk dilantik sebagai penyelesai baharu ('permohonan kebenaran'). Perayu juga telah mencelah dalam permohonan pelepasan tersebut bagi menentang permohonan tersebut kerana jika mahkamah memerintahkan pelepasan responden, dia tidak boleh selepas itu dipertanggungjawabkan ke atas pelanggaran yang dikatakan telah berlaku semasa dia memegang jawatan sebagai penyelesai syarikat tersebut. Mahkamah Tinggi membenarkan permohonan pelepasan dan menolak permohonan kebenaran tersebut, justeru, rayuan semasa. Isu utama yang perlu ditentukan oleh mahkamah adalah sama ada faedah penamatan perkhidmatan dan indemniti sebagai ganti notis merupakan 'upah atau gaji' ataupun termasuk dalam mana-mana kategori hutang yang, mengikut s 527 Akta Syarikat 2016 ('AS 2016'), diberi keutamaan sebelum tuntutan-tuntutan badan am pemiutang-pemiutang.

Diputuskan, membenarkan sebahagian rayuan-rayuan terhadap keputusan-keputusan Mahkamah Tinggi dalam permohonan kebenaran dan permohonan pelepasan, dan mengenepikan pelepasan responden dengan kos RM20,000 yang perlu dibayar oleh syarikat tersebut kepada perayu tertakluk kepada alokator:

(1) Keutamaan tuntutan-tuntutan dalam likuidasi dikawal oleh s 527(1) dan (2) AS 2016. Peruntukan yang paling penting ialah subperenggan (b) dari sub-s (1) s 527, yang menyatakan bahawa gaji dan upah akan menjadi keutamaan berbanding semua hutang tidak bercagar lain, kecuali hutang yang timbul sebagai kos atau perbelanjaan dalam penggulungan itu sendiri. Yang penting, hanya gaji yang diperoleh dalam tempoh empat bulan sebelum permulaan penggulungan akan diberi keutamaan di bawah subperenggan (b). Subperenggan (c) memperuntukkan item seterusnya diberi keutamaan, iaitu pampasan

pekerja yang perlu dibayar di bawah mana-mana undang-undang bertulis yang terakru sebelum permulaan penggulungan (lihat perenggan 13–15).

(2) Berdasarkan autoriti kes *Indo Malaysia Engineering Co Bhd v Muniandy Rengasamy* [1990] 3 MLJ 301, mahkamah berpendapat bahawa faedah penamatan dan indemniti sebagai ganti notis yang dibayar oleh responden sebagai penyelesai syarikat tersebut kepada pekerja-pekerja syarikat tersebut tidak sepatutnya diberi keutamaan berbanding tuntutan-tuntutan pemiutang-pemiutang tidak bercagar syarikat yang lain. Alasan ini sahaja mewajarkan pemberian kebenaran kepada perayu untuk memulakan prosiding terhadap responden (lihat perenggan 21).

(3) Lanjutan itu, rayuan terhadap permohonan pelepasan juga harus dibenarkan sebahagiannya iaitu setakat mengenepikan perintah mahkamah di bawah untuk pelepasan responden sebagai penyelesai syarikat. Bagaimanapun, mahkamah mengesahkan perintah pelantikan Encik Victor Saw sebagai penyelesai. Tiada cadangan bahawa responden telah mendapat manfaat secara peribadi daripada pelanggaran yang dipertikaikan, dan oleh itu pelantikan penyelesai daripada firma yang sama, PwC, tidak seharusnya boleh dibantah dan akan membantu kesinambungan dalam proses likuidasi. Bagaimanapun, mahkamah juga memerintahkan supaya penyelesai yang dicalonkan perayu, Encik Gabriel Teo, dilantik sebagai penyelesai bersama dengan Encik Saw, supaya kepentingan perayu dan pemiutang-pemiutang secara amnya dilindungi dengan sewajarnya (lihat perenggan 23).]

Cases referred to

Indo Malaysia Engineering Co Bhd v Muniandy Rengasamy [1990] 3 MLJ 301, SC (folld)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) s 191, 191(2), 292(1)

Companies Act 2016 ss 525(1), 527, 527(1), (1)(b), (1)(c) (2)

Appeal from: *Re London Biscuits Bhd (in liquidation) and another case* [2022] MLJU 3013 (High Court, Kuala Lumpur)

Steven Tan Chee Qian (with Chuah Chern Tee) (Chuah Qian & Partners) for the appellant.

Kwan Will Sen (with Pang Huey Lynn) (Lim Chee Wee Partnership) for the respondents.

Azizul Azmi Adnan JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant in this case is a former auditor of London Biscuits Bhd, a company which is in liquidation (referred to in this judgment as the 'company'). The company owes the appellant approximately RM393,571 in outstanding fees that had been billed between 2014 and 2016.

[2] The company was once a biscuit and cake manufacturer that was listed on Bursa Malaysia. It was wound up on 13 January 2020. Mr Lim San Peen, an insolvency practitioner with Price Waterhouse Coopers Advisory Services Sdn Bhd ('PwC'), was appointed the liquidator of the company.

[3] Once he was appointed as liquidator, Mr Lim did not immediately terminate the services of the employees of the company. They remained on the payroll for a period of about four months before they were terminated. Upon termination, they were paid termination benefits and an indemnity in lieu of notice.

[4] Before the High Court, Mr Lim San Peen applied to be discharged and released as the liquidator of the company and for one Victor Saw to be appointed in his stead. Among the reasons advanced for this application (referred to here as the 'discharge application') was the fact that Mr Lim was due to complete his tenure with PwC. It was suggested that the appointment of Mr Saw, who had been assisting Mr Lim in the liquidation of the company, would provide continuity to the liquidation process.

[5] The appellant made a separate application (the 'leave application') to the High Court for an order that (among others) leave be granted to the appellant for proceedings to be commenced against Mr Lim San Peen for certain contended breaches of his duties as the liquidator of the company.

[6] The appellant intervened in the discharge application. It opposed the discharge application because (amongst others) once the court ordered the release and discharge of Mr Lim, he could not thereafter be made liable for alleged breaches that were said to have occurred during his tenure as liquidator

[7] In the leave application, the appellant had not only sought for leave to commence proceedings against Mr Lim, but also had sought for an order declaring that he was in breach of his duties in respect of certain specific contentions. Before us, the claim for declaratory reliefs was discontinued. The appellant maintained only the substantive prayers for leave to commence

proceedings against Mr Lim, and for a liquidator nominated by it to be appointed as the new liquidator (instead of Mr Saw).

[8] The grounds upon which the appellant sought to oppose the discharge application and to advance the leave application were substantially similar There were seventeen grounds raised in total. For reasons that will be apparent, we do not consider it necessary or even helpful to enumerate all of them here. We would only observe that some of the grounds raised merited serious consideration, but the inclusion of certain other tenuous grounds served only to detract from the force of counsel's arguments.

[9] The learned High Court judge hearing the applications allowed the discharge application and dismissed the leave application, against which decisions the appellant now appeals.

ANALYSIS AND DECISION

[10] In our considered view, the payment by the liquidator of termination benefits and indemnity in lieu of notice to the then employees of the company in priority to the claims of the unsecured creditors amounted to a preference that was not permitted by the terms of the Companies Act 2016. For this reason, the appeal against the dismissal of the leave application should be allowed. We also allow in part the appeal against the discharge application, setting aside the release and discharge of Mr Lim.

[11] The reasons for our decision are explained in the following paragraphs.

Termination benefits and indemnity in lieu of notice

[12] In the course of liquidation of the company, Mr Lim San Peen as liquidator caused the company to pay out RM1,744,155.27 to the employees of the company as termination benefits and as compensation in lieu of notice (the latter was referred to in the relevant affidavits as 'indemnity in lieu of notice'). This payment was made in priority to the claims of the general body of unsecured creditors.

[13] The priority of claims in a liquidation is governed by s 527 of the Companies Act 2016, sub-ss (1) and (2) of which provides as follows:

> Section 527 Priorities
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> (1) Subject to this Act, in a winding up there shall be paid in priority to all other unsecured debts —
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> (a) firstly, the costs and expenses of the winding up including the taxed costs of a petitioner payable under section 468, the remuneration of

the liquidator and the costs of any audit carried out under section 514;

(b) secondly, all wages or salary, whether or not earned wholly or in part by way of commission, including any amount payable by way of allowance or reimbursement under any contract of employment or award or agreement regulating conditions of employment, of any employee not exceeding fifteen thousand ringgit or such other amount as may be prescribed whether for time or piecework in respect of services rendered by him to the company within a period of four months before the commencement of the winding up;

(c) thirdly, all amounts due in respect of worker's compensation under any written law relating to worker's compensation accrued before the commencement of the winding up;

(d) fourthly, all remuneration payable to any employee in respect of vacation leave, or in the case of his death to any other person in his right, accrued in respect of any period before the commencement of the winding up;

(e) fifthly, all amounts due in respect of contributions payable during the twelve months next before the commencement of the winding up by the company as the employer of any person under any written law relating to employees social security contribution and superannuation or provident funds or under any scheme of superannuation or retirement benefit which is an approved scheme under the federal law relating to income tax; and

(f) sixthly, the amount of all federal tax assessed under any written law before the date of the commencement of the winding up or assessed at any time before the time fixed for the proving of debts has expired.

(2) The debts in each class specified in subsection (1) shall rank in the order specified but debts of the same class shall rank pari passu and shall be paid in full, unless the property of the company is insufficient to meet the debts, in which case the payment shall be reduced and the rate of reduction shall be in equal proportion.

[14] Of particular relevance is sub-para (b), which provides that salary and wages would rank ahead of all other unsecured debts, except for debts arising as a cost or expense in the winding up itself. Importantly, only salary earned in the four months preceding the commencement of winding up would be accorded priority under sub-para (b).

[15] Subparagraph (c) provides for the next item to be accorded priority, which is worker's compensation due under any written law that had accrued prior to the commencement of winding up.

[16] The key and determinative question was whether termination benefits and the indemnity in lieu of notice constitutes 'wages or salary' or otherwise comes within any of the categories of debts that are, by s 527, accorded priority ahead of the claims of the general body of creditors.

[17] This question was considered by the Supreme Court in *Indo Malaysia Engineering Co Bhd v Muniandy Rengasamy* [1990] 3 MLJ 301. In that case, receivers were appointed under a debenture in respect of certain assets of Indo Malaysia Engineering Co Bhd, the defendant company in that case. The receivers terminated the services of the plaintiffs, who were employees of the defendant. The plaintiffs lodged a complaint to the Commissioner for Labour, who subsequently ordered the defendant to pay (among others) termination benefits and indemnity in lieu of notice.

[18] The issue before the Supreme Court was whether the termination benefits and indemnity in lieu of notice took priority over the debts owed to the debenture holder. By s 191 of the Companies Act 1965, wages and salaries took priority over payments of interest and principal to the debenture holder. Section 191(2) incorporates by reference the provisions of s 292(1), and provides as follows:

> (2) For the purposes of subsection (1) the references in paragraphs 292 (1) (b), (c), (d) and (e) to the commencement of the winding up shall be read as a reference to the date of the appointment of the receiver or of possession being taken as aforesaid (as the case requires).

[19] Section 292(1) of the Companies Act 1965 was in pari materia with s 527(1) of the present Act.

[20] The Supreme Court found that termination benefits and indemnity in lieu of notice did not constitute wages or salary and therefore could not be accorded priority over the payments due to the debenture holder. Jemuri Serjan SCJ stated as follows:

> [I]n the case of termination benefits, they are payable under reg 4(1) of the Employment (Termination and Lay-off Benefits) Regulations 1980. Regulation 4(1) states that an employee is entitled to termination benefits payment where his contract of service is terminated for any reason whatsoever. In this case the *termination benefits became due only after the termination of employment of the plaintiffs on 11 July 1986 and therefore are not wages for the purpose of s 191(1) read with s 292(1)(b).*
>
> There remains the question of indemnity in lieu of notice. *This payment is clearly not for work done or payment for services rendered and was not paid before the appointment of receivers as contemplated by* s 292(1)(b). We need only cite the case of *Re VIP Insurances Ltd* (1978) 3 ACLR 751 reported on 30 October 1978 which was referred to us by counsel of the appellants at p 144 of his bundle of authorities, the

decision of the Supreme Court of New South Wales Equity Division. It was held by Needham J, the payments to employees in lieu of notice were not payments of wages or salary because wages or salary were consideration for work which was done by an employer while any payments in lieu of notice were made because the employee was not given the opportunity or not put under the responsibility or obligations of earning an equivalent amount of wages or salary. (Emphasis added.)

[21] On the authority of *Indo Malaysia Engineering Co Bhd v Muniandy Rengasamy* we are of the view that the termination benefits and indemnity in lieu of notice paid by Mr Lim San Peen as liquidator of the company to its then employees ought not have been accorded priority over the claims of the other unsecured creditors of the company. This reason alone, in our judgment, warranted the grant of leave to the appellant in order to commence proceedings against Mr Lim.

[22] Accordingly and in the light of the abandonment by the appellant of the declaratory reliefs initially prayed for in the leave application, we do not consider it necessary for us to determine the other grounds of the appeal advanced for the appellant.

[23] It follows that the appeal against the discharge application should also be allowed, to the extent that the order of the court below for the discharge and release of Mr Lim as the liquidator of the company is set aside. However, we affirm the order for the appointment of Mr Victor Saw as liquidator There is no suggestion that Mr Lim had benefitted personally from the contended breaches, and hence the appointment of a liquidator from the same firm, PwC, should not be objectionable and would greatly aid continuity in the liquidation process. However, we also order that the appellant's nominated liquidator, Mr Gabriel Teo, be appointed as a joint liquidator with Mr Saw, in order that the interests of the appellant and the creditors generally are appropriately safeguarded.

[24] We observe for completeness that the contention of unlawful preference that was constituted by the payment of termination benefits and indemnity in lieu of notice was not specifically addressed in the grounds of judgment of the court below, except in general terms when the learned judge held as follows:

18. With regards the applicant's contending that the POD's were paid out without the need to prove and therefore was in contravention of s 525(1) of the Companies Act 2016, I find that the same is entirely misconceived as these were payments made out as averred to by the Liquidator for preferential claims under the Companies Act 2016 and thus no prejudice has been caused to the other creditors of the company. It has not been shown to this court by the applicants, who has made the said allegations, that it was for otherwise than for such preferential claims.

[25] For the reasons explained above, our judgment would be as follows:

(a) we allow in part the appeal against the decision of the High Court in the discharge application and in this connection:

(i) we hereby direct that Mr Lim San Peen not be discharged and released as liquidator of the company;

(ii) but we affirm the appointment of Mr Victor Saw as a liquidator of the company; and

(b) we allow in part the appeal against the decision of the High Court in the leave application and we hereby:

(i) grant leave to the appellant to commence proceedings against Mr Lim San Peen;

(ii) direct the removal Mr Lim San Peen as the liquidator of the company; and

(iii) appoint Mr Gabriel Teo as a joint liquidator of the company together with Mr Victor Saw.

[26] We determine the costs of the appeals to be RM20,000, payable by the company to the appellant. Such costs are to be subject to an allocator.

Appeals allowed in part against High Court's decisions in leave application and discharge application; release and discharge of respondent set aside with costs of RM20,000 to be paid by company to appellant subject to allocator.

Reported by Dzulqarnain Ab Fatar